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No. 98

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM V. MASSEI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent's brief brings into sharp focus the basic issue in this case. Respondent contends, and the Court of Appeals held, that an indispensible element in every net worth case is proof by the Government of a "likely source" from which the defendant derived the net worth increase which he failed to report. Here, the figures concerning opening net worth and increases in net worth during the prosecution years "were sufficiently grounded in the evidence" (R. 797), were accepted by the Court of Appeals, and are accepted by respondent as proven.[1]

[1] "This case resolves itself into the question of whether the Government satisfied its burden of proving the essential element of a likely source." (Resp. Br. 18) See also Point I

Respondent also accepts the fact that "The Government investigation showed the respondent received no nontaxable receipts." (Br. 20). With it thus established that there was sufficient proof that the net worth increases were not attributable to nontaxable receipts, we submit that it was not necessary for the Government to present affirmative proof of a specific likely source of taxable receipts.

Although evidence of a likely source is not, in our view, always essential in every case, in this case there was, in any event, proof tending to show that graft was a likely source of respondent's unreported net worth increases—evidence which we believe was properly admitted.

I

WHERE IT IS PROVEN THAT AN INCREASE IN NET WORTH CAME FROM UNREPORTED TAXABLE INCOME, IT IS NOT NECESSARY TO PROVE A LIKELY SOURCE

1. THE HOLLAND CASE DOES NOT MAKE PROOF OF A LIKELY SOURCE MANDATORY

Respondent relies wholly on *Holland* v. *United States*, 348 U. S. 121, and contends that that case lays down a rigid rule that in every net worth case the Government must affirmatively show a likely source of taxable income to account for the increases in net worth. But respondent misinterprets the *Holland* opinion.

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of respondent's argument (Br. 20) which treats "the Increases in Net Worth" as a fact not here challenged.

Respondent's comment (Br. 21) that "It is interesting to note that the Government investigation in no way negated the possession of cash by the respondent at the beginning of the period" is incorrect. See, *e. g.*, R. 569–570.

In the first sentence of the section of that opinion entitled *"Net Worth Increases Must be Attributable to Taxable Income"*, 348 U. S. at 137, the Court states the rule to be as follows:

> Also requisite to the use of the net worth method is evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income.

The Government accepts the applicability of that rule, of course, and believes it was fully satisfied by the proof adduced here.

In the *Holland* case the petitioners claimed that "the Government failed to adduce adequate proof because it did not negative all the possible nontaxable sources * * *." 348 U. S. at 137. The Court found that in the absence of relevant leads from the taxpayer such negative proof was not necessary and that an acceptable substitute was "proof of a likely source." The Court said that "Any other rule would burden the Government with investigating the many possible nontaxable sources of income * * *." 348 U. S. at 138. The *Holland* opinion thus suggests that evidence supporting the inference that the gain was taxable may be *either* in a negation with reasonable certainty of possible sources of nontaxable income *or* by proof a likely source of taxable income *or* by some other evidence. Proof of a likely source was not an additional requirement but was an alternative type of evidence which could be used by the Government where it was difficult or impossible to prove that there had been nontaxable receipts. The *Holland* opinion explicitly recognized that the net worth method

was "a potent weapon in establishing taxable income from *undisclosed* sources." 348 U. S. at 126. (Emphasis added.)

2. THERE IS NO REASON TO MAKE PROOF OF A LIKELY SOURCE MANDATORY IN EVERY NET WORTH CASE

Respondent does not advance any reason for requiring proof of a likely source in every net worth case. We believe there is none. Certainly, evidence of the precise source of a receipt is not necessary to show its taxability. The taxable nature of a receipt does not depend upon the particular source from which it came. In fact, unequivocal proof of the source from which funds came will frequently not resolve the question of whether the funds represent taxable income. Funds withdrawn from a business may represent income or return of capital; funds received from an individual might be a gift, loan, or payment for services rendered.

There is nothing in the statute which would require affirmative proof of a particular source. And there is no logical consideration which should lead a court to conclude that the inference that increases in net worth represent taxable income must rest on evidence of a particular source from which it is likely that the increases came. The test should be, rather, whether there is evidence supporting the conclusion, implicit in a verdict of guilt, that the increase in net worth was not derived from nontaxable receipts, and hence must have been derived from some taxable source.

Evidence of likely source is helpful, and in most cases will make it easier for a jury to be convinced of guilt, but other evidence may be equally or more

persuasive. As pointed out in our main brief, both the Second and Third Circuits have so held. *United States* v. *Ford*, 237 F. 2d 57 (C. A. 2), certiorari granted, 352 U. S. 1000, case dismissed as moot, November 18, 1957; *United States* v. *Adonis*, 221 F. 2d 717 (C. A. 3).

To hold that the Government need not, in every net worth case, prove a likely source does not, as respondent suggests, "put the burden on a defendant to prove his innocence" (Br. 36). The Government must in every case establish, with reasonable certainty, the opening net worth and the increase which takes place. The Government must also, as *Holland* holds, supply evidence supporting the inference that the increase is attributable to currently taxable income; and this burden can be met, we submit, by presenting evidence negating any inference that the increase came from nontaxable sources. Of these essential elements the jury must be convinced beyond a reasonable doubt. The defendant may stay quiet and make the Government prove its case. And this Court has provided further protection against possible conviction of an innocent man by requiring the Government to check all relevant leads reasonably susceptible of being checked (348 U. S. at 136):

> When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury.

To require proof of a particular source of income in every case "would be tantamount to holding that

skilful concealment is an invincible barrier to proof." *United States* v. *Johnson*, 319 U. S. 503, 518.

3. THERE WAS AMPLE EVIDENCE THAT RESPONDENT'S RECEIPTS MUST HAVE BEEN TAXABLE INCOME

As stated in our main brief (pp. 30–31), there was an exhaustive investigation of respondent's financial situation both during the indictment years and before which failed to reveal any nontaxable receipts which would explain the increases in net worth.

But in this case there was not a mere failure to find nontaxable receipts; there was affirmative evidence that there were no nontaxable receipts. It was admitted that respondent's wife had at no time inherited or received as a gift money or other valuables (R. 456). Respondent had not received any gift from his sisters (R. 456) nor had he inherited anything from his father except a half interest in the house in which he was living (R. 253, 278).[2] Beyond this, respondent's lawyer testified that he had inquired of respondent "as to whether he had received anything over and above what was on his tax returns" during the period 1945 to 1950 and that the only nontaxable receipt he had been told about by respondent was the half interest in the house (R. 665). Further, respondent's position, as testified to by his counsel at the trial, was "that all of the cash which he expended

[2] Respondent points out that the value of this house does not appear in the Record. (Br. 8). This is of no significance since, rather than adding the value of the house into the net worth calculation and then subtracting it out as a nontaxable receipt, the house was not included in the net worth calculation at all. R. 508.

during the six-year period from 1945 to 1950 was in his possession at the beginning of 1945." (R. 629). This statement contains not only the contention that respondent received no taxable income during the period (which the jury rejected) but the admission that he received no nontaxable receipts, an admission which the jury was clearly justified in accepting, corroborated as it was by all the other evidence.

Respondent recognizes that there is incontrovertible proof that none of the increase in net worth came from nontaxable receipts. He admits that the Government's evidence "showed the respondent received no nontaxable receipts" (Br. 20). Point I of his argument is that "Evidence Proving No Nontaxable Receipts" is not enough to support the inference that the receipts were taxable. But logic and common sense are against him. All increases in net worth represent either taxable or nontaxable receipts. If, as respondent agrees, the Government showed that "respondent received no nontaxable receipts", the receipts must have been taxable.

As stated in our main brief (p. 32) the inference that the gain was taxable was also supported by evidence of concealment and fabrication of false explanations. Respondent concealed funds by keeping them in nine different accounts in eight different banks or other savings institutions (R. 120, 124, 127, 129, 131, 136, 141, 143, 189). More than half of the accounts were carried in his wife's name. In addition, large purchases were made in cash, for which there were no corresponding withdrawals from any of these ac-

counts.[3] There was also evidence that respondent had purchased the annuity policies because "this was a good way to hide cash" (R. 580).

The testimony that his counsel fabricated a story about respondent's having inherited money from his father is further evidence supporting the inference that the increases in net worth during the years 1949 and 1950[4] were in fact taxable. Respondent now argues that these statements were "immaterial" (Br. [illegible]) since no figure as to the amount inherited was mentioned. But these statements were made in an effort to explain a substantial increase in net worth during the years after his father's death. These statements were to the effect that "Mr. Massei's father had accumulated a large sum of cash with reference to liquor sales" (R. 491), and that respondent had obtained funds after the death of his father who had saved "a lot of cash" (R. 581). The evidence was that no funds whatever reached respondent

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[3] Evidence was that the following purchases were made with cash during the indictment period (R. 514–516):

Annuity policy	$26,212.40	Lot	$400.00
Deposit on lot	100.00	Auto	400.00
Auto	931.88	Furnishings	800.00
Stock	345.62	Stock	1,680.36
Land	1,600.00	Stock	1,725.92
Stock	714.35	Lot	800.00
Stock	1,140.90	Heating system	1,445.00
Building contractor	4,966.25	Annuity policy	29,947.80
Land	1,200.00	Auto	600.00

[4] Respondent is incorrect in his quotation of the court's instruction on this point (Br. 22) and also incorrect in saying that the court instructed the jury that they could infer a taxable source from this evidence for the year 1948. The court instructed the jury that as to the "period after the father had died" it could find respondent guilty without proof of likely source "if you find there has been a wilful fabrication" (R. 744).

through his father's estate. When taken in context, the jury was entitled to conclude that these statements were deliberately misleading, and that the increases in net worth in the years following his father's death actually represented taxable income.

II

THE TRIAL COURT WAS CORRECT IN ADMITTING EVIDENCE THAT RESPONDENT RECEIVED GRAFT DURING YEARS PRIOR TO 1946

Respondent advances three reasons why the trial court should not have admitted evidence as to his having accepted bribes and graft prior to the period covered by the indictment: (1) that this fact was irrelevant, (2) that the evidence was based on admissions which were not corroborated, and (3) that to introduce the admissions violated the lawyer-client privilege (Resp. Br. 23–33).

1. THE TAKING OF BRIBES BY A POLICEMAN IS RELEVANT TO THE SHOWING OF A LIKELY SOURCE OF TAXABLE INCOME

Our main brief (pp. 34–37) demonstrates, we believe, that respondent's acceptance of bribes over a long period of time was relevant to the issues in this case. Respondent argues that the law "does not permit any inference that because a man has sinned once he will sin again" (Br. 26). But he also argues that "the Government must make an independent showing of such illegal payments to appellant during the indictment years" (Br. 35). Respondent therefore concedes that from evidence of one or more instances of bribe-taking the jury could conclude that

other bribes had been taken. And there is no rule of law or logic that this factual inference may be drawn only if the bribe occurs within the calendar year of the income, or that the fact is wholly irrelevant if the bribe occurs in a different year.

Respondent urges that the evidence of prior bribe-taking is irrelevant and immaterial since respondent had been promoted to a different assignment and that "there is no showing that the respondent's duties and responsibilities during the indictment years were such that it would be worth anyone's while to bribe him" (Br. 27). On the contrary, the evidence was that throughout most of the indictment period respondent was the one man (R. 216) who had "an inspector's duties" and that it was his duty to see that the men on the street in uniform carried out their assignments (R. 206). In short, if any policeman in Worcester was to be effectively prevented by bribery from carrying out his duty, respondent was in a position where he, too, would have to be persuaded.

Respondent wants it both ways. He argues that it is indispensible that the government introduce evidence of a likely source of income, and then argues that evidence showing an illegal source is inadmissible, since it may be prejudicial and would be supporting the conviction of one crime by evidence of another. We submit that evidence of a likely source is relevant but not indispensible, and that evidence of such a source need not be kept from the jury simply because respondent acquired income in an illegal rather than a legal way.

The evidence of bribe-taking in former years was also relevant on the issue of intent to evade taxes, the evidence showing that he paid no income tax on such bribes in the earlier years. That the judge's charge was unduly favorable to respondent in this regard (see opinion below, R. 805–806) does not make the evidence less admissible. We do not understand how this prior tax evasion could have been brought to the attention of the jury (as suggested by the court below) without calling their attention to the bribes.

2. THE ADMISSIONS WERE CORROBORATED

The court below found that "the crucial issue in this case is that dealing with corroboration of the aforementioned admissions" (R. 802). Respondent argues that there is "not an iota of corroboration in the evidence" (Br. 28). As pointed out in our main brief (pp. 37–40), we believe that this contention misconceives what is required in the way of corroboration.

Corroboration does not require independent proof of the same fact. *Smith* v. *United States,* 348 U. S. 147; *United States* v. *Calderon,* 348 U. S. 160. That respondent received graft in prior years was corroborated by the large opening net worth not explained by his salary, and by his financial history of concealment and cash transactions. The admissions were also corroborated by the independent proof of the crime, as discussed in Point I above since, we submit, the crime was established independently of the admissions as to graft.

3. THE ADMISSIONS WERE AUTHORIZED, AND HENCE COULD NOT HAVE VIOLATED THE LAWYER-CLIENT PRIVILEGE

Respondent urges this Court to overrule the findings of the trial judge, the jury, and the court of appeals and to hold that the admissions made by respondent's attorney, Garrity, were not authorized by respondent and that their disclosure violated the lawyer-client privilege (Resp. Br. 29–33). We believe that this point, which was not discussed in our main brief, is wholly without merit.

There is no question of lawyer-client privilege where information is given to an attorney for the purpose of being disclosed, nor where the attorney is authorized by the client to make the admission. Respondent agrees (Br. 32):

> Of course, if the attorney was in fact Massei's agent, any statement made by him within the scope of his agency was a statement made by Massei.

The sole issue here is thus whether there was evidence to support the factual conclusion that Garrity was authorized to make the statements for Massei.

On this issue the judge held an extensive *voir dire* (R. 306–406) during which he ruled that the statements would be admissible against respondent but that the ultimate question of authority would be for the jury (R. 370). The jury was appropriately instructed that before the admissions could be weighed against respondent they must find that Garrity was authorized to make these statements for his client (R. 732). The jury, by its verdict, indicated that they found there was authority. The court of appeals examined the

point. While expressing the view that the issue was one of law, the court found that both the judge and jury had been convinced that there was sufficient proof of agency and that there had been no prejudicial error in letting the jury pass on the question (R. 805, fn. 5). There is no occasion for this Court to consider the question of authority, which is an issue of fact on which both lower courts have passed.

Should the Court wish to consider the point, we submit that the record is clear and that the evidence amply supports the jury's conclusion:

(*a*) Authority for the admissions can be found from the fact that Garrity made one of the admissions in the presence of his client (the respondent) who participated in the conversation (R. 437).

(*b*) The entire course of conduct was for Garrity to find out the facts and tell them to the agents. During the investigation Garrity sent a number of letters disclosing facts to the Government. R. 450–460.

(*c*) At the trial respondent conceded that Garrity was authorized to send letters disclosing facts about the respondent: "Those letters there is no question about. They are admissible as admissions of the defendant, your Honor" (R. 589).

(*d*) There was also evidence that Garrity was authorized to make statements orally as well as in writing (R. 661):

> The COURT. * * * you wouldn't have gone there unless you had the authority of your client to go and speak; isn't that right?

> The WITNESS [Garrity]: I think that is correct, your Honor.

Respondent's case on this point boils down to the contention that Garrity was authorized to make statements to the Government concerning his client either in writing or orally; that if the statements were in writing they became binding admissions but that if they were oral they were somehow unauthorized disclosures violating the lawyer-client privilege. Neither the judge nor the jury were bound to accept such a strained notion of Garrity's authority.

Finally, respondent complains (Br. 12–13) that he was not allowed to introduce evidence tending to show that Garrity's statements were made in a hypothetical way and not as admissions of fact. The record shows, however, that as soon as respondent made his purpose clear he was allowed to put in all the evidence he desired on that point.[5] Evidence was introduced and the jury was instructed that the admissions could only be considered if the jury first found that they were made as statements of fact and not as assumptions or hypotheses (R. 733).

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[5] "The COURT. Do I understand, Mr. Maguire—, * * * What you desire to get is evidence, not to show what the contentions were, but to show that there were contentions on the theory that if there were contentions by Mr. Garrity it's for the jury?

"Mr. MAGUIRE. Exactly, your Honor.

"The COURT. I'll permit it.

"Mr. MAGUIRE. That's exactly what I'm trying to get at.

"The COURT. All right. That comes within the orbit of what I said before" (R. 587–588).

CONCLUSION

For the reasons stated herein and in the Government's main brief, it is respectfully submitted that the judgment below should be reversed and the case remanded to the Court of Appeals.

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